

November 29, 2017

VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Presentation, *Restoring Internet Freedom*, WC Docket No. 17-108

Dear Ms. Dortch,

On November 27, 2017, I met with Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Rosenworcel, and on November 28, 2017, I met with Claude Aiken, Wireline Legal Advisor to Commissioner Clyburn. Both meetings relate to the above-referenced proceeding. In those meetings, I emphasized that the Chairman's draft Order is a significant departure from almost two decades of bipartisan agreement concerning net neutrality. The FCC, under the leadership of both Republican and Democratic Chairmen, have agreed that the Commission is the expert agency to ensure that the internet remains open in the U.S.; that broadband internet access service ("BIAS") providers must abide by open internet principles; and that the FCC should enforce net neutrality. In contrast, Chairman Pai proposes that the Commission abdicate its responsibilities and end the open internet as we know it. Instead, BIAS providers will now be permitted to block, throttle, and force websites, applications and services to pay BIAS providers to avoid the slow lane that BIAS providers will institute, and no federal agency will be able to stop them. This fundamental policy shift takes control of the internet experience from each American and hands it over to AT&T, Comcast, Verizon, and Charter—ending a successful, bipartisan policy of individual internet freedom that has grown the internet economy and is the envy of the world.

The proposed Order is a far cry from the net neutrality principles first introduced by FCC Chairman Michael Powell during President George W. Bush's administration—which emphasized that consumers should be able to obtain and have the freedom to access the content, applications, devices of their choice, and that the Commission "must ensure that the various capabilities of these technologies are not used in a way that could stunt the growth of the economy, innovation and consumer empowerment."¹ It also is a major divergence from the

¹ Remarks of FCC Chairman Michael K. Powell at the Silicon Flatirons Symposium, Preserving Internet Freedom: Guiding Principles for the Industry, at 2-3 (2004) ("*Chairman Powell Speech*").

Policy Statement the Commission adopted on a bipartisan basis the following year, during Chairman Martin's term, that stated "the Commission has a duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age."² Each principle began with "[t]o encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled":

- to access the lawful Internet content of their choice;
- to run applications and use services of their choice, subject to the needs of law enforcement;
- to connect their choice of legal devices that do not harm the network; and
- to competition among network providers, application and service providers, and content providers."³

No longer will consumers have any of these guarantees—guarantees that the FCC implemented as rules in 2010 and in 2015 because BIAS providers are in the position to and have harmed the availability of an open internet. Under the proposed Order, the FCC will have no adequate rules to protect and promote the open internet, and it will have relinquished its ability to enforce net neutrality by finding that the authority it has been granted by Congress is inapplicable. The differences between the Chairman Pai approach and the Chairman Martin approach are stark. In FCC Chairman Kevin Martin's Testimony to Senate Commerce Committee in April 2008, he stated:

Over the past decade, the Internet has had a powerful impact on the economy and on the lives of American citizens. We have witnessed the fruits of increased innovation, entrepreneurship, and competition that this technology has helped deliver. As policymakers, any rules of the road in this area must maintain an open and dynamic Internet that will allow it to continue to be an engine of productivity and innovation that benefits all Americans.

I. FCC PRINCIPLES PROTECTING CONSUMER ACCESS TO THE INTERNET

The Commission has a duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age. In 2005, the Commission adopted an Internet Policy Statement concerning four principles. The Commission's goal was to clarify how it would evaluate broadband Internet practices on a going forward basis.⁴

² *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, FCC 05-151, ¶ 5 (2005).

³ *Id.* ¶ 4.

⁴ Written Statement of The Honorable Kevin J. Martin Chairman Federal Communications Commission Before the United States Senate Committee on Commerce, Science and

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II. FCC's ROLE IN PROTECTING CONSUMER AND ENFORCING OUR PRINCIPLES

As the expert communications agency, it was appropriate for the Commission to adopt, and it is the Commission's role to enforce, this Internet Policy Statement. In fact, the Supreme Court in its *Brand X* decision specifically recognized the Commission's ancillary authority to impose regulations as necessary to protect broadband internet access.

I do not believe any additional regulations are needed at this time. But I also believe that the Commission has a responsibility to enforce the principles that it has already adopted. Indeed, on several occasions, the entire Commission has reiterated that it has the authority and will enforce these current principles.⁵

...

Contrary to some public claims about Commission's approach generally, for the Commission to take enforcement action against a telephone company for blocking and degrading a particular application but refuse to pursue enforcement action against a cable company blocking or degrading a particular application would unfairly favor the cable industry.

I believe that the Commission must remain vigilant in protecting consumers' access to content on the internet. Thus, it is critically important that the Commission take seriously and respond to complaints that are filed about arbitrary limits on broadband access and potential violations of our principles. Indeed, I have publicly stated that the Commission stands ready to enforce this policy statement and protect consumers' access to the internet.⁶

If the current draft Order is adopted, the Commission will abdicate its responsibility to ensure that consumers have access to an open internet, and the competitive services, applications, and websites an open internet offers. The FTC does not have the jurisdiction or authority to enforce net neutrality, and the record shows that antitrust law is insufficient to protect and promote an open internet.

Indeed, the evidence on the record demonstrates that large BIAS providers have the means and motive to discriminate against services provided over the internet that compete

Transportation April 22, 2008, at 2, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-281690A1.pdf.

⁵ *Id.* at 3-4.

⁶ *Id.* at 5.

against their own vertically integrated services. The draft Order ignores this important evidence. It is telling that the Department of Justice just issued a complaint to stop a proposed AT&T/DirecTV merger, in part, because the merger will enhance the ability of AT&T to impede and slow innovation online,⁷ but the FCC will not review evidence from prior mergers that demonstrate the same concerns. DOJ is also concerned about the likelihood and effect of oligopolistic coordination between AT&T and Comcast, specifically stating “after the merger, AT&T/DirecTV and Comcast/NBCU, which together have almost half of the country’s MVPD customers, would have an increased incentive and ability to harm competition by impeding emerging online competitors that they consider a threat, and increasing the prices for the networks they own.”⁸ DOJ’s present concerns are exactly what then-Chairman Powell previously raised when he stated that the principles he proposed “will serve as an important ‘insurance policy’ against the potential rise of abusive market power by vertically-integrated broadband providers.”⁹ No longer is this a concern by the current Chairman. The head-in-the-sand approach is arbitrary, ill-advised, and will result in consumer and competitive harm.

As INCOMPAS has emphasized, the importance of an open internet has increased significantly—more consumers and businesses are relying on the open internet than ever before. Since strong net neutrality policy went into place in 2015, we have seen an explosion in streaming services that provide more choices at lower prices. We also have also seen businesses, large and small, migrating to low-cost cloud services in record numbers.

The hard fact remains—Americans are trapped by broadband monopolies. High-speed competitive options do not exist for well over the majority of Americans, so when their only high-speed provider begins to offer tiers of BIAS service that look like the cable service they abhor—they will be stuck. If they complain to the FCC, there are no rules that require the BIAS provider to offer an open internet. If they complain to the FTC, the FTC can only enforce if the BIAS provider isn’t following its own terms of service—which no longer have to abide by net neutrality—and whether the FTC will have jurisdiction is still up for debate in the 9th Circuit. Thus, there is a risk that *no* federal agency will have *any* ability to prevent BIAS providers from harming consumers. In sum, the FCC is giving the pen and complete power and freedom to a handful of large BIAS providers and is taking away all the previously guaranteed internet freedoms away from individual consumers and businesses.

I also provided a copy of the November 20, 2017 ex parte that INCOMPAS filed that set forth the reasons why the Commission should not abandon its responsibility to oversee interconnection and internet traffic exchange, and I reiterated the arguments made therein that large BIAS providers have shown their propensity and ability to block lawful internet traffic, that since the *2015 Open Internet Order* such behavior has decreased, and that without FCC oversight, we expect that large BIAS providers will revert to their previous behavior.

⁷ *USA v. AT&T Inc.*, Complaint, at 19-20, *available at* <https://www.justice.gov/opa/press-release/file/1012896/download>.

⁸ *Id.* at 21.

⁹ *Chairman Powell Speech* at 6.

Accordingly, I urged Messrs. Litman and Aiken to advise the Commissioners to dissent from the draft Order.

Respectfully submitted,

/s/Angie Kronenberg

Angie Kronenberg
Chief Advocate & General Counsel

cc: Travis Litman
Claude Aiken